SUPREME COURT, U. S.

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No. 470

In the Supreme Court of the United States

OCTOBER TERM, 1961

ALBIN C. HALQUIST and MADELINE E. HALQUIST,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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ALBIN C. HALQUIST and MADELINE E. HALQUIST,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is as to the scope of "mining", as defined in the Internal Revenue Codes of 1939 and 1954 [1] and applied to the taxpayer's dolomite deposit, for the purpose of computing the taxpayer's percentage depletion allowance for income

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[1] See Section 114(b)(4)(B) of the 1939 Code, and Section 613(c) of the 1954 Code, which are printed in Appendix B to the petition, pp. 24, 27-28.

tax purposes. The statutory definition of "mining" was interpreted by this Court in *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76. The issue in this case involves simply the application of *Cannelton* to the particular facts of the case. The court of appeals' interpretation and application of *Cannelton* is correct and there is no conflict of decisions.

While the taxpayer contends that the decision below is incorrect (Pet. 11-14), the brief argument made in support of the contention is without merit. The statement that *Cannelton* "clearly indicated" that actual sales of the mineral in question are required to make the mineral a "commercially marketable" mineral product within the meaning of the statute (Pet. 12) is directly contrary to the statements in *Cannelton* that integrated miner-manufacturers are to be treated as selling the mineral to themselves (364 U.S. at 87, 89), which makes them their own market, and that sales are significant only as providing conclusive proof of the point at which the mineral is in a state "ready for industrial use or consumption" and thus has "passed the 'mining' state on which the depletion principle operates" (*id.* at 86). Taxpayer asserts that those statements are "broad generalizations lifted out of context from the *Cannelton* case" (Pet. 13), but the fact is that the statements are an integral and important part of the *Cannelton* decision.

Taxpayer offers no adequate reason for granting the writ. Its petition is devoted primarily to explaining that the Court will thereby have an opportunity to elaborate on its *Cannelton* opinion. There is no

need for that. The principles enunciated in *Cannelton* are sufficient to dispose of this case, as the court below recognized, even though a different mineral is involved and the facts are different in other respects. Nor, contrary to the taxpayer's assertion (Pet. 14), does it appear that other lower courts have had any serious difficulty in applying *Cannelton*, except to the extent that in some cases a remand has been considered appropriate for further evidence or findings on the facts necessary to its application. See, *e.g.*, *Bookwalter* v. *Centropolis Crusher Co.*, 281 F. 2d 798 (C.A. 8th); *United States* v. *Pacific Clay Products*, 285 F. 2d 215 (C.A. 9th); *Riddell* v. *Victorville Lime Rock Co.*, 292 F. 2d 427 (C.A. 9th); *Riddell* v. *California Portland Cement Co.* (No. 16438, C.A. 9th), decided October 5, 1961; *United States* v. *Portland Cement Co. of Utah* (C.A. 10th), decided July 27, 1961 (8 A.F.T.R. 2d 5307); *Great Bend Brick & Tile Co.* v. *United States*, 194 F. Supp. 309 (D. Kans.); *Vulcan Materials Co.* v. *Sauber* (N.D. Ill.), decided March 7, 1961 (7 A.F.T.R. 2d 1130); *Scott* v. *United States* (N.D. Ala.), decided September 21, 1960 (6 A.F.T.R 5690).

The court below correctly interpreted and applied guiding principles already supplied by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER, 1961.

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